86-521

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOHN DISALVO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION

Whether the tape recorded statement of an alleged co-conspirator who is not available to testify must have sufficient indicia of reliability prior to its being admitted into evidence.

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Opinions in the Courts Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ:	
The Court of Appeals Erred in Failing to Determine that Alleged Co-Conspirators' Out-of-Court Statements had Sufficient Indicia of Reliability Before Admitting Same into Evidence	4
Conclusion	6
Appendix:	
Judgment Order of the Court of Appeals, November 19, 1985	A-1
Memorandum Opinion of the District Court, March 14, 1985	A-3
Certificate of Service	A-7

TABLE OF AUTHORITIES

Cases:	Page
Boone v. Marshall, 760 F.2d 117 (CA 6, 1985)	5
Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 64 L.Ed 2d 597 (1980)	4
Ottomo v. United States, 468 F.2d 269 (CA 1, 1972)	5
United States v. Ammar, 714 F.2d 238 (CA 3, 1983)	5
United States v. Caputo, 791 F.2d 37 (CA 3, 1986)	5
United States v. DeLuna, 763 F.2d 897 (CA 8, 1985)	5
United States v. Inadi, 748 F.2d 812 (CA 3, 1984)	3
United States v. Inadi — U.S. — 106 S.Ct. 1121 (1986)	4
United States v. Molt, 758 F.2d 1198 (CA 7, 1985)	5
United States v. Ordonez, 722 F.2d 530 (CA 9, 1983)	5
United States v. Perez, 702 F.2d 33 (CA 2, 1983)	5
Federal Rules of Criminal Procedure:	
Rule 801(d)(2)(E)	2

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OPINIONS IN THE COURTS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit is unreported and is reproduced beginning at page one of the Appendix. The Memorandum Opinion of the District Court is reproduced beginning at page A-3 of the Appendix.

STATEMENT OF JURISDICTION

This criminal conviction was affirmed by the United States Court of Appeals for the Third Circuit on May 22,

* In the United States Court of Appeals for the Third Circuit, the appeal of Joseph Maleno (No. 85-1155) was consolidated with that of Petitioner.

1986, and thereafter a timely Petition for Re-Hearing was filed and denied on July 28, 1986, making this Petition timely when filed within sixty days therefrom, pursuant to Supreme Court Rule 20.1. The Court's jurisdiction is invoked pursuant to the provisions of Title 28, U.S. Code §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule of Criminal Procedure 801(d)(2)(E):

> (d) Statements which are not hearsay. A statement is not hearsay if— . . .
>
> > (2) Admission by party-opponent. The statement is offered against a party and is . . .
> >
> > > (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

Petitioner JOHN DiSALVO was convicted at a bench trial of conspiracy to distribute methamphetamine and unlawful use of a communication facility. He was sentenced to a term of imprisonment of eleven years to be followed by four years probation.

At trial, the evidence against Petitioner consisted mainly of a series of five telephone conversations to which he was a party, as well as two laboratory apparatus catalogues seized from Petitioner's vehicle at the time of his arrest.

The telephone conversations were intercepted pursuant to a court-ordered wiretap of a co-defendant's telephone. By themselves, these calls were innocuous, but in combination with other intercepted calls involving alleged co-conspirators, they were found by the District Court to take on a sinister hue. These other calls, as interpreted by an agent of the Drug Enforcement Administration, were then used to taint the calls of Petitioner and give them a criminal meaning. The defense objected to the use of taped conversations between individuals who were not present in court.

There is no question that the trial court used the evidence of conversations between other persons for the incriminatory interpretations which served as the basis for conviction. All of Petitioner's innocuous sounding conversations were found to deal with the distribution of methamphetamine, after and as the result of interpretation of conversations involving others. These other calls were used to give clarification to the meaning to be assigned to the otherwise ambiguous conversations to which Petitioner was a participant.

Following affirmance by the Third Circuit Court of Appeals, Petitioner filed a motion pursuant to 28 U.S.C. §2255 on the basis that the government had not demonstrated the unavailability of the co-conspirators whose conversations were utilized by the trial court to interpret the conversations, and that the reliability of the statements was not established. This was denied by the trial court which held that use of the co-conspirator's statement was a non-hearsay use, not subject to the requirements of *U.S. v. INADI*, 748 F.2d 812 (CA 3, 1984), (A-4). Although raised in the Motion, the question of reliability was not addressed by the District Court.

Petitioner appealed to the Third Circuit, which deferred decision pending this Court's disposition of *INADI*, and after that case was reversed by the Supreme Court, *UNITED STATES v. INADI*, — U.S. — 106 S.Ct. 1121 (1986), the Third Circuit affirmed the District Court, (A-1). Subsequent thereto, Petitioner requested that the question of reliability of these statements be considered by the Circuit Court, both by Memorandum filed at the request of the Court and by Petition for Rehearing, but the Third Circuit declined to act.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS ERRED IN FAILING TO CONSIDER THE RELIABILITY OF THE STATEMENTS OF THE UNAVAILABLE DECLARANTS.

The central issue at Petitioner's trial was whether or not his conversations with co-defendant Maleno were connected with the distribution of drugs, or were merely innocuous conversation. In order to characterize the conversations as criminal, the government was compelled to use other conversations said to involve drugs, to then conclude that Petitioner was also discussing drugs and catch him in the net. The parties to certain of the conversations alleged to be members of the conspiracy, were on trial, and thus unavailable to testify. Others were not produced at trial, and testified by means of tape recorded conversations. *OHIO v. ROBERTS*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed 2d 597 (1980), held that the Confrontation Clause of the Sixth Amendment has been held to restrict the range of admissible hearsay by requiring a showing that the declarant is unavailable and that the statement bears sufficient indicia of reliability.

However, in *INADI*, this Court noted that the reliability of the statements was not an issue before the

Court, 106 U.S. at 1124, f.n. 3, and would not be decided. Likewise, Justice Marshall in his dissent noted that the decision did nothing to resolve the conflict among the lower courts as to whether such statements must be shown to have the indicia of reliability before being admitted for substantive purposes against the defendant. 106 S.Ct. at 1129, f.n.1.

Indeed, in the Third Circuit the rule is clear that co-conspirator's statements are an exception to the hearsay rule, being excluded from Fed.R.Evid. 801(d)(2)(E), and cannot be regarded as inherently reliable. Accordingly, it must be separately ascertained whether the statements sought to be admitted are reliable. *UNITED STATES v. AMMAR*, 714 F.2d 238, 256 (CA 3, 1983). This requirement has survived *INADI* and is still the law in the Third Circuit. *UNITED STATES v. CAPUTO*, 791 F.2d 37 (CA 3, 1986).

This is also the rule in the Second Circuit, *UNITED STATES v. PEREZ*, 702 F.2d 33 (1983); the Eight Circuit, *UNITED STATES v. DeLUNA*, 763 F.2d 897 (1985) and the Ninth Circuit, *UNITED STATES v. ORDONEZ*, 722 F.2d 530 (1983).

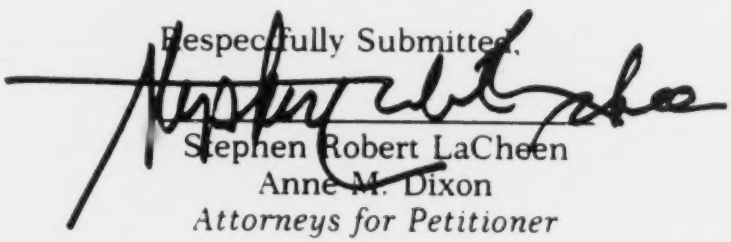
A contrary rule, which essentially holds that reliability is presumed once a statement comes into evidence via the co-conspirator exception, controls in the First Circuit, *OTTOMO v. UNITED STATES*, 468 F.2d 269 (1972); the Sixth Circuit, *BOONE v. MARSHALL*, 760 F.2d 117 (1985); and the Seventh Circuit, *UNITED STATES v. MOLT*, 758 F.2d 1198 (1985).

There is a clear conflict among the various circuits, which could result in this Court assuming jurisdiction. However, in view of the failure of the District Court and the Court of Appeals to address the question of reliability, a more prudent course would be to return the matter to the District Court to determine whether or not the statements were reliable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the Judgment of the United States Court of Appeals for the Third Circuit, which affirmed a Judgment of the United States District Court for the Eastern District of Pennsylvania. Alternatively, this matter should be remanded to the District Court so that a factual determination concerning the reliability of the co-conspirators' out of court statements may be made.

Respectfully Submitted,



Stephen Robert LaCheen
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Attorneys for Petitioner

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1192

UNITED STATES OF AMERICA
v.
DISALVO, JOHN,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 83-00041-01)
District Judge: Hon. Louis H. Pollak

Argued: November 19, 1985

Before: HIGGINBOTHAM, SLOVITER and MANSMANN,
Circuit Judges.

JUDGMENT ORDER

Appellant, John DiSalvo, contends that the district court erred in admitting the out-of-court statements of a nontestifying coconspirator, who was not shown to be unavailable, for the purpose of giving an incriminatory interpretation to the appellant's own statements.

After consideration of appellant's contentions, and in light of *United States v. Inadi*, ____ U.S. ____, 106 S. Ct. 1121 (1986), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

_____

Circuit Judge

Attest:

_____

Sally Mrvos, *Clerk*

DATED: May 22, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
JOHN DISALVO	:	NO. 83-0041-1

MEMORANDUM

POLLAK, J. MARCH 14, 1985

In July 1983, after a five-day bench trial, petitioner John DiSalvo was convicted of one count of conspiracy to distribute methamphetamine in violation of 21 U.S.C. §846 and three counts of unlawful use of a communication facility in violation of 21 U.S.C. §843(b). Mr. DiSalvo was subsequently sentenced to (1) five years of incarceration for the conspiracy count, and (2) six years of incarceration plus four years of probation for the three counts of unlawful use of a communication facility. Mr. DiSalvo has petitioned for a new trial, on the ground that his conviction was based in part on the out-of-court statements of co-conspirators who were not called to testify at trial.[1] In the alternative, Mr. DiSalvo seeks a reduction of sentence. Both motions are opposed.[2]

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1. In his motion, although not in the accompanying brief, Mr. DiSalvo alleges that he was denied effective assistance of counsel. The ineffective assistance argument is in reality derivative of the Confrontation Clause argument: the petition for a new trial alleges that "to the extent that counsel may be deemed not to have raised the confrontation clause issue, . . . [Mr. DiSalvo's] representation was deficient and denied DiSalvo the effective assistance of counsel." Motion for New Trial at ¶12B. Because *I presume, for purposes of deciding Mr. DiSalvo's Confrontation Clause claims, that counsel did preserve those claims at trial, see United States v. Inadi*, 748 F.2d 812, 819 (3d Cir. 1984), I find it unnecessary to consider the ineffective assistance claim.

2. Mr. DiSalvo has filed a third motion, in which he seeks to stay the execution of his sentence pending a ruling on his motion for

I. MOTION FOR A NEW TRIAL

Mr. DiSalvo's motion for a new trial is based on the Trial Circuit's recent decision in *United States v. Inadi*, 748 F.2d 812 (3d Cir. 1984). In that case, the Third Circuit reversed the narcotics conviction of one Joseph Inadi due to the introduction, as substantive evidence against Inadi, of taped conversations of co-conspirators who were not called to testify at Inadi's trial. 748 F.2d at 818-19. Mr. DiSalvo argues (1) that the evidence against him consisted largely of tapes of telephone conversations in which he did not participate, and (2) that the government neither called all the participants in those conversations to testify nor established that they were unavailable to testify. Under *Inadi*, Mr. DiSalvo argues, a showing of unavailability was required before the out-of-court statements in question could be used against him without producing the declarants for cross-examination.

I recently ruled on a similar motion filed by one of Mr. DiSalvo's co-defendants, Joseph Maleno.[3] *See United States v. Maleno*, Criminal Action No. 83-0041-2, Slip Op. (E.D. Pa. March 4, 1985), *appeal docketed* (March 12, 1985). In *Maleno*, I denied the petitioner's *Inadi*-based motion for a new trial, holding that (1) the Confrontation Clause does not require the government to make out-of-court declarants available for cross-examination when the declaration in question is to be used for a nonhearsay purpose, and (2) the out-of-court statements at issue in *Maleno* were indeed used by the court (as factfinder) for a nonhearsay purpose. *Id.* at 7-16. The latter holding was based in large part on my bench opinion of July 15, 1983, in which I explained my

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NOTES *(Continued)*

a new trial. Because the Order that accompanies this Memorandum does rule on the new trial motion, the motion for a stay will be denied as moot.

3. There were two other co-defendants tried together with Mr. DiSalvo and Mr. Maleno.

reasons for finding the defendants (including Mr. DiSalvo) guilty, and in which I discussed my use of out-of-court conversations against defendants who did not participate in those conversations. *See* Tr. 755-780 (July 15, 1983); *Maleno, supra*, slip op. at 11-15.

My ruling in *Maleno* necessarily controls Mr. DiSalvo's motion. The petitioner in *Maleno* did not identify any particular conversations whose use against him allegedly violated the Confrontation Clause,[4] and my bench opinion did not discuss the use of co-conspirator statements against Mr. Maleno. *Maleno, supra*, slip op. at 12-13. Accordingly, I found it "only prudent to assume for purposes of deciding Mr. Maleno's petition for a new trial that conversations of absent co-conspirators were indeed used against Mr. Maleno, for the same purposes as against the other defendants." *Id.* at 13. Thus, I expressly considered the validity, under the Confrontation Clause, of my use of co-conspirator statements against the other defendants, including Mr. DiSalvo. *See id.* at 14-15 & n.6. It follows that my conclusion — that the conversations were used for nonhearsay purposes — applies equally to all four co-defendants in Mr. DiSalvo's trial.

Accordingly, Mr. DiSalvo's motion for a new trial will be denied for the reasons stated in *Maleno, supra*.

II. MOTION FOR REDUCTION OF SENTENCE

Mr. DiSalvo's Rule 35 motion seeks both (1) a reduction of sentence and (2) permission to surrender himself directly to the institution in which his sentence must be served. The government has no objection to the second request; accordingly, that request will be granted. The government does oppose any reduction of Mr. DiSalvo's sentence. Having considered the reasons which Mr. DiSalvo offers for reducing his sentence and

4. The same is true of Mr. DiSalvo.

the government's arguments in response, and having reviewed the relevant portions of the record in this case, I conclude that the motion for reduction of sentence should be denied.

III. CONCLUSION

For the foregoing reasons, the motion for a new trial will be denied, and the motion for reduction of sentence will be denied. Mr. DiSalvo will, however, be granted the opportunity to surrender himself directly to the institution in which he is to be incarcerated.

An appropriate Order is attached.

Respectfully Submitted

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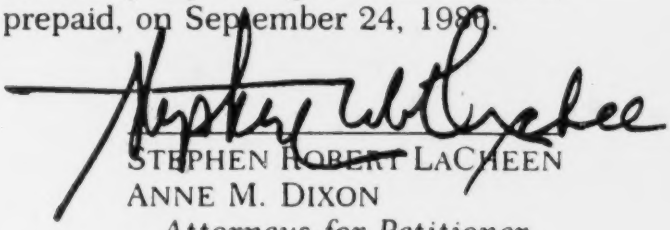
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that three copies of the Petition for Certiorari to the United States Court of Appeals for the Third Circuit and Appendix thereto were served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing same in the mail, first class postage prepaid, on September 24, 1986.



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